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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. KENNETH JERMAINE PAGE-SMITH, Defendant and Appellant.	H027199 (Santa Cruz County Super. Ct. No. F07226)

After the trial court denied his motion to suppress evidence (Pen. Code, § 1538.5), appellant pleaded no contest to one count of unlawful transportation of cocaine (Health & Saf. Code, § 11352, subd. (a)).

Appellant appeals from the resulting conviction on the ground that the trial court erred in denying his motion to suppress. We affirm.

Statement of Facts[1]

On May 7, 2003, Officers Zube and Azua, along with members of the Santa Cruz County Narcotics Enforcement Team (CNET), participated in an undercover "buy bust" operation in the parking lot of Lighthouse Field State Beach in Santa Cruz. Police knew

[1] Since appellant pleaded no contest, the facts are taken from the preliminary hearing transcript.

the location to have a high level of narcotics activities, including possession, sales and transportation. The marijuana enforcement team for the Sheriff's department had received information that sales of marijuana were being conducted there.

At approximately 3:10 p.m., Officer Zube bought $40 of marijuana from a Mr. Nichols. Nichols told Officer Zube that there was more marijuana available should he need it. Before the sale, Officer Zube had watched Nichols for about one and a half hours, but he did not see any hand-to-hand transactions with other buyers. Nichols was sitting on a bench with two other individuals who were drinking beer and playing "hackey-sack." Officer Zube watched Nichols for about 45 minutes after the sale, but did not see any other sales of marijuana.

During this time, Officer Azua had been acting as the "direct point" in the operation. He observed the parking lot and relayed information to other officers as to the whereabouts of various people in the area. At about 3:10 p.m. he received word that Officer Zube had purchased marijuana from Nichols. Later, at about 3:45 p.m., he saw appellant and another man enter the parking lot in a yellow Mercedes. Appellant was driving the car while the other man sat in the passenger seat. Appellant parked the car, got out and walked over to the area where Nichols was located. Appellant and Nichols had a brief conversation. Appellant walked back to the car, "sat in the driver seat, looked back, and just sat there."

Officer Azua testified that based on his extensive background with regard to narcotics possession and sale, including assignment to the Drug Enforcement Agency, undercover buying and selling operations, and testifying as an expert witness, he strongly suspected that appellant was at the location to buy drugs from Nichols. In addition, he suspected that Nichols felt threatened by appellant's large stature so that he did not want to reveal the location of his drugs. Officer Azua explained that in this situation a drug dealer would often direct a buyer to wait in a different location while he retrieves the drugs and completes the sale.

About two minutes after appellant got back into the car, the case agent gave the signal to have Officer Azua and the other members of the surveillance team move in and arrest Nichols. The parking lot was blocked and uniformed officers got out of unmarked police cars.[2] As the officers moved in, appellant began to back the car out of the parking stall. Officer Azua testified that he intended to detain appellant pursuant to Health and Safety Code section 11532 [loitering in a public place under circumstances suggesting intent to engage in drug-related activity.] Officer Azua identified himself with his department-issued badge and directed appellant to park his car. Officer Azua testified that he spoke in a tone loud enough to be heard, but did not shout.

Officer Azua told appellant to get out of the car. He pat-searched him for weapons. In addition, he pat-searched the passenger and found him to be in possession of marijuana. Officer Azua asked appellant if there were any drugs or weapons in the vehicle. When appellant replied that there were not, Officer Azua asked if appellant minded if he searched the car. Appellant said no.[3] On the floorboard of the passenger side, Officer Azua found a plastic bag containing approximately six grams of cocaine in about 60 rocks. After finding the drugs, Officer Azua took appellant and the other man into custody. Officer Azua conducted a full search of appellant's person during which he found two room keys to the Ramada Inn Motel.

After obtaining appellant's consent, Officer Azua searched the motel room and found plastic bags, razor blades, and a bag containing 2.9 grams of cocaine. Appellant was charged with one count of unlawful transportation of cocaine (Health & Saf. Code, § 11352 subd. (a), count one), and one count of unlawful possession for sale of cocaine (Health & Saf. Code, § 11351.5, count two). Initially, appellant pleaded not guilty to both counts. On August 25, 2003, the trial court denied appellant's motion to suppress

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2 Officer Azua estimated that eight to 13 officers showed up in the parking lot.

3 According to Officer Azua, this statement was made in front of two other officers.

the evidence collected from the car and the motel room. (Pen. Code, § 1538.5.) At the same time, the court denied a motion to set aside the information. (Pen. Code, § 995.)

In denying the suppression motion and 995 motion the trial court noted "it's very close. But for the activity here that this Mr. Nichols was clearly in the business here, so to speak, of selling marijuana, and you have the specific actions Mr. Ngo[4] is talking about, it's pretty slim. In addition to that, of course, the officer testified that this is a high trafficking area and the officer has been there to observe this kind of activity for quite some time, so it's clear that he is in the business of selling contraband. [¶] So it's that whole issue that seems to me the case turns on, as both of you have indicated. I think it's slim but I think it's enough. We are talking about a detention here that, under the circumstances, I think does pass muster, but just barely. . . . But it's awfully close, as you've indicated."

Thereafter, on February 26, 2004, appellant pleaded no contest to count one. The District Attorney agreed to dismiss count two in the interest of justice. The trial court suspended imposition of a 36-month sentence and placed appellant on probation with various terms and conditions not relevant here.

Appellant filed a timely notice of appeal on March 12, 2004.

Discussion

Appellant asserts that the trial court erred in denying his motion to suppress evidence. Essentially, he argues that he was detained without reasonable suspicion.

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[4] Deputy District Attorney Ngo argued that appellant "drove up, parked his car, walked directly to Mr. Nichols . . . and the officer has been there for a few hours observing Mr. Nichols engaging in the sales of marijuana. If [appellant] had just stopped his car, looked around, maybe mill around or do what people normally do when they park their car in the parking lot, no, he didn't do that. He stayed - - the passenger stayed in the car, so - - to indicate that it's going to be a brief moment. The driver, [appellant], went directly and came back and waited and I believe that's sufficient for a detention."

Consequently, his consent cannot justify the search. Thus, the evidence was obtained illegally.

The People concede that appellant was detained, but argue that appellant's actions, Nichols's status as a known narcotics dealer, and Officer Azua's expertise "combine to create reasonable suspicion sufficient for detention." Thus, the People argue, because the detention was lawful, appellant's consent to the search of his car and motel room was not " 'the fruit of an illegal assertion of authority.' " Consequently, the evidence obtained was admissible.

"The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]" (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

"The Fourth Amendment to the United States Constitution prohibits seizures of persons, including brief investigative stops, when they are 'unreasonable.' " (*People v. Souza* (1994) 9 Cal.4th 224, 229.) Under certain circumstances, a person may be temporarily detained so that police officers can investigate possible criminal activity. Such a detention is reasonable when the police officer can articulate specific facts "that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*Id*. at p. 231.)

When discussing how reviewing courts should make reasonable suspicion determinations, the United States Supreme Court has said "repeatedly" that we "must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing. [Citation.] This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them

that 'might well elude an untrained person.' [Citations.] Although an officer's reliance on a mere 'hunch' is insufficient to justify a stop [citation], the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard. [Citation.]" (*United States v. Arvizu* (2002) 534 U.S. 266, 273-274.)

Relying on *People v. Gallant* (1990) 225 Cal.App.3d 200 (*Gallant*), appellant argues that there was not reasonable suspicion to detain since he was suspected of attempting to purchase drugs simply because he approached a person who sold marijuana earlier that day.

In *Gallant*, police officers executed a search warrant at the residence of one Gardner, who lived with her mother. There were no male subjects mentioned in the warrant. Several "baggies" of methamphetamine were found at the residence, and Gardner and her mother were arrested. About 30 to 40 minutes after Gardner arrived at the residence, the defendant drove up and parked at the curb in front. He walked to the front of the house and knocked on the door. (*Id*. at p. 203.) One of the officers answered the knock by drawing his gun and opening the door. Before the defendant said anything, the officer identified himself, explained that they were searching the residence, and advised defendant that he would be detained. Then, the officer ordered the defendant to step inside the residence. Immediately upon entering, the defendant was told to put his hands on top of his head, and an officer pat-searched him. Another officer began questioning the defendant, who identified himself and said that he was there to see Gardner. The officer asked the defendant if he would consent to a search of his person and vehicle for controlled substances. The defendant gave his consent and $3,000 was found on his person. Methamphetamine and other controlled substances were found in defendant's vehicle and boat. (*Id*. at p. 204.)

Division Two of the Fourth District Court of Appeal held that the initial detention was unlawful because there were no facts at all connecting the defendant to the premises

or to the criminal activity which they suspected of being conducted at the premises. (*Gallant, supra,* 225 Cal.App.3d at pp. 207-208.) "[T]his record supports only one conclusion: that the detention here was predicated on nothing more than a hunch, or unfounded suspicion, and a policy that anyone who came to a residence during a search was automatically going to be detained and questioned to eliminate the possibility that the person was involved in the criminal activity in the house. That hunch and that policy were insufficient to justify [the] defendant's detention. Therefore, that detention violated [the] defendant's constitutional rights to be free from unreasonable searches and seizures." (*Id*. at pp. 210-211, fn. omitted.)

Initially, we note that one case has questioned *Gallant's* continued viability in light of *People v. Glaser*, *supra*, 11 Cal.4th 354. (*People v. Samples* (1996) 48 Cal.App.4th 1197, 1206.) However, even assuming *Gallant* is still good law, it is factually distinguishable from the present case. In *Gallant,* there was nothing about that defendant to suggest he might be involved in any criminal activity before his detention. (*Gallant*, *supra*, 225 Cal.App.3d at p. 203.)

In contrast, here, appellant acted in a suspicious manner before he was detained. He parked his car, and despite the fact that there were other people in the area, went straight to a known drug dealer, Nichols. He had a brief conversation with Nichols. Appellant returned to his car, remained seated and waited while looking back in the direction of Nichols. When uniformed police officers arrived in the parking lot, appellant began to back his car out of the parking stall. In Officer Azua's experience, this behavior was consistent with a narcotics transaction in progress. The area was known by law enforcement to be an area of high narcotic activity. Although Officer Azua was not personally aware of such transactions, he knew that several local agencies, including the Sheriff's department, had received information about marijuana sales taking place there. Based on appellant's actions, the reputation of the area and his extensive training and background in the field of narcotics, Officer Azua suspected that Nichols directed

appellant to return to his car and wait for the delivery of the marijuana. As noted the United States Supreme Court has reiterated that police officers can "draw on their own experience and specialized training to make inferences from and deductions about . . . information available to them . . . ." (*United States v. Arvizu*, *supra*, 534 U.S. at p.273.)

Although appellant did not race out of the parking lot, he did attempt to leave when officers arrived. "[E]ven though a person's flight from approaching police officers may stem from an innocent desire to avoid police contact, flight from police is a proper consideration—and indeed can be a key factor—in determining whether in a particular case the police have sufficient cause to detain." (*People v. Souza*, *supra*, 9 Cal.4th at p. 235.)

We acknowledge that this is a very close case. Having considered the totality of the circumstances and giving due weight to the factual inferences drawn by Officer Azua, however, we hold that Officer Azua had reasonable suspicion to believe that appellant was loitering with intent to engage in some form of drug transaction. From the following facts, it was reasonable for Officer Azua to infer that appellant was engaged in a narcotics transaction in which the seller tells the buyer to wait in a different location. Appellant was present in a high narcotics trafficking area. He contacted a known marijuana seller. He loitered in the parking lot while looking back towards the seller. Further, he attempted to leave on seeing uniformed officers.

Accordingly, we conclude that under the totality of the circumstances there was sufficient reasonable suspicion to detain appellant. Since appellant does not dispute that he gave consent to search his car and motel room, and because the detention was justified, the evidence discovered in the searches was admissible. Thus, the trial court did not err in denying appellant's motion to suppress.

Disposition

The judgment is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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MIHARA, J.